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IN THE

Supreme Court of the United States

October Term, 1981

GILES M. LUGAR,

Petitioner

v.

EDMONDSON OIL COMPANY, INC.
and
RONALD L. BARBOUR,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. When the Petitioner did not challenge the constitutionality of the Virginia attachment statutes in either the District Court or the Court of Appeals, should he be permitted to challenge the constitutionality of the statutes for the first time in this Court?

2. If this Court should decide to review the constitutionality of the Virginia attachment statutes, do the statutes provide the debtor with a timely and sufficient hearing that satisfies the Due Process Clause of the Fourteenth Amendment?

3. Whether the Petitioner's Complaint and the arguments of his counsel demonstrate that the Petitioner was deprived of any property without due process of law within the meaning of the Fourteenth Amendment?

4. When the Petitioner failed to challenge the constitutionality of the Virginia attachment statutes and did not allege that any state official acted improperly in following the mandate of the law, but only alleges improper conduct by Respondents acting as private citizens, does the Petitioner state a valid claim for relief within contemplation of §1983?

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INTRODUCTION

Giles M. Lugar, Plaintiff in the trial court, will hereafter be referred to as "Petitioner". Edmondson Oil Company, Inc., and Ronald L. Barbour, Defendants in the trial court, will hereafter be referred to as "Respondents". All references to the Petition for Writ of Certiorari will be designated "P" with the appropriate page number. References to the trial court record will be designated "R" and assigned the appropriate index number assigned by the Clerk of the District Court. All references to the Joint Appendix will be designated "J.A." with the appropriate page number.

STATUTORY PROVISION INVOLVED WHICH IS NOT INCLUDED IN PETITION FOR WRIT OF CERTIORARI OR PETITIONER'S BRIEF ON THE MERITS

Virginia Code §8-538. When bond given officer to take possession of property. --

> If the plaintiff shall, at the time of suing out an attachment, or afterwards, give bond with surety, approved by the clerk issuing the attachment, in a penalty of at least double the fair value of the property on which the attachment is levied, with condition to pay all costs and damages which may be awarded against him or sustained by any person, by reason of his suing out the attachment, the officer to whom the attachment is directed shall take possession of the property specified in the attachment, or when no such property is specified, of any estate or effects of the defendant, or so much thereof as is sufficient to pay the plaintiff's claim. When such bond is given, the fact shall be endorsed on the attachment, or certified by the clerk to the officer, who shall return the certificate with the attachment. But the officer levying the attach-

ment shall, before taking possession of any property as aforesaid, make his certificate of the fair value of the property on which the attachment is levied, and he shall not take possession of the same unless and until bond as aforesaid shall be given in a penalty of at least double the fair value of the property as so stated in his certificate. Such certificate shall be filed in the clerk's office of the court to which the attachment is returnable and the value so certified shall be subject to review by the court to which the attachment is returnable.

SUMMARY OF ARGUMENT

1. The Petitioner failed to challenge the constitutionality of the Virginia attachment statutes in either the District Court or the Fourth Circuit Court of Appeals. In fact, he wrote a Memorandum to the District Court stating that "No question of the constitutional validity of the State statutes is made". (District Court Record, R. 5). During the arguments to the Court of Appeals, the Petitioner continued his refusal to raise any direct challenge to the constitutional validity of the Virginia attachment statutes. (P. 43). As a result of the Petitioner's continued refusal to raise this issue, the validity of the statutes was never considered by the District Court or the Court of Appeals. It is submitted that this Court should not permit the Petitioner to challenge the statutes for the first time in this Court.

2. Even if this Court should decide to consider the constitutionality of the Virginia attachment statutes, the statutes would satisfy all tests of fundamental fairness required by the Due Process Clause of the Fourteenth Amendment. Virginia Code §8-556 (Petitioner's Brief, p. 14) provides the debtor with a timely and sufficient hearing before the court in which an attachment is pending simply by making a motion to the court for a hearing. The attachment will be quashed if the court finds that it was issued upon false suggestion or without sufficient cause. This evidentiary hearing before a judicial officer of the State is in accord with this Court's decisions in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

3. The Petitioner's Complaint and the arguments of his counsel demonstrate that the Petitioner has failed to show that he was deprived of any property right secured by the Constitution and the laws of the United States. As stated by the Court in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978), a plaintiff must meet two requirements to show a valid cause of action under §1983:

> (1) The deprivation of a right secured by the Constitution and the laws of the United States; and
>
> (2) The deprivation of such a right by a person while acting under color of law.

When all of the Petitioner's allegations are accepted as true in the case at bar, the Petitioner has shown nothing more than the private misuse of a valid state statute by private citizens of the State

of Virginia. It is well settled by the decisions of this Court that the Due Process Clause of the Fourteenth Amendment offers no protection from deprivation of property by private individuals.

The remedies provided by the State of Virginia to a debtor from action by a malicious creditor are thoroughly adequate to protect citizens of the State. The attachment statute requires a bond, with security, and a penalty at least double the amount of the creditor's claim for the protection of a debtor who suffers monetary loss from an attachment improperly issued. The State also recognizes the tort remedy of abuse of process as additional protection for a defendant who has been damaged by a citizen who has abused legal process provided by the State.

4. In the case at bar, the Petitioner did not challenge the Virginia attachment statutes nor did he impugn the ministerial roles of the clerk of court and sheriff who properly followed the mandate of Virginia law (Petitioner's Brief, p. 16). The Petitioner alleged no improper use of State power or State law by officials of Virginia.

It is submitted that the heart of Petitioner's claim as set forth in the Complaint is that a private party should be able to challenge a deprivation of a Constitutional right by another private party (Petitioner's Brief, p. 28). Under the decisions of this Court, the conduct alleged in the initial Complaint does not state a claim upon which relief could be claimed within contemplation of §1983.

In the circumstances of the present case where one private party is

suing another private party and where all State statutes and actions of State officials are valid, there must be some allegation that the private defendant had some joint understanding or engagement, either express or implied, with a State official to improperly use the power of the State in order for the private defendant to be acting under color of law within the meaning of §1983.

ARGUMENT

I.

THE PETITIONER DID NOT CHALLENGE THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES IN THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS, HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE STATUTES IN THIS COURT.

The Complaint commencing the present civil action is set forth in three detailed counts with numerous factual allegations. (J.A. pp. 2-21). All of the factual allegations have been accepted as true by the Courts below and the Respondents. The Complaint does not challenge the Constitutional validity of the Virginia attachment statutes nor does it impugn the conduct of the court clerk and sheriff for the ministerial roles they played is issuing and levying the attachment. "Ordinarily, this Court does not decide

questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401 (1976).

As noted in the District Court's opinion (P. 38-40), the Petitioner did not question the constitutional validity of the Virginia attachment statutes. The District Court's statement is clearly supported by the Petitioner's Memorandum in Opposition to Respondents' Motion to Dismiss (District Court Record, R. 5). In this Memorandum, the Petitioner states:

> "The Defendants state... that the Plaintiff's claim for federal jurisdiction and his entire case is predicated upon the alleged absence of due process, by virtue of the application of State attachment statutes. This is incorrect. A reading of the Complaint...shows conclusively that the gravamen of this action is the alleged wrongful acts by the Defendant. No question of the constitutional validity of the State statutes is made." (Emphasis added).

Again, in the en banc oral argument before the Fourth Circuit Court of Appeals, the Petitioner reiterated his disaffirmance of a challenge to the Constitutional validity of the Virginia statutes. The Circuit Court took note of the Petitioner's position in its opinion when it stated:

> "...Lugar suggested somewhat ambivalently that he might not be challenging the statute's constitutionality, so that state court interpretation was not needed. After the motion to abstain was denied, this ambivalence persisted, both in the district court and on appeal to this court." (P. 43).

Since the constitutionality of the Virginia statutes was not placed in issue in either the District Court or the Circuit Court and was not decided by either Court, Petitioner should not be permitted, for the first time, to challenge the statutes in this Court. Adickes v. S. H. Kress and Co., 398 U.S. 144, 147,

90 S.Ct. 1598, 1602-1603 (1970), footnote 2.

The decisions of this Court and decisions of various Circuit Courts of Appeal relied upon by the Petitioner in his Brief concern direct Constitutional challenges to state statutes. Petitioner cites in support of his position the decisions of this Court in Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972), and Lynch v. Household Finance Corp., 405 U.S. 538 (1972). These decisions involved challenges to the replevin statutes of the States of Florida and Pennsylvania in Fuentes and to the garnishment statute of the State of Connecticut in Lynch.

The decisions of the Circuit Courts of Appeal relied upon by the Petitioner demonstrate that a Constitutional attack on a state statute was involved in each case: Johnson v. American Credit Co. of

Georgia, 581 F.2d 526 (5th Cir. 1978) (Prejudgment attachment statute of State of Georgia held to violate procedural due process of law in violation of Fourteenth Amendment); Guzman v. Western State Bank of Devils Lake, North Dakota, 516 F.2d 125 (8th Cir. 1975) (North Dakota prejudgment attachment statute held unconstitutional as violation of Due Process Clause; Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973) (Arizona garnishment statutes held to violate Due Process Clause); Jonnet v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976) (Pennsylvania's foreign attachment statutes held unconstitutional as lacking procedural due process).

In both this Court's decisions and the Courts' of Appeal decisions relied upon by Petitioner, there was a direct

constitutional attack on the statutes involved and a decision was rendered based on the Court's analysis of the particular statute. State involvement was undisputed and never an issue in any of these cases.

Conversely, neither the District Court nor the Fourth Circuit Court of Appeals addressed the question of the Constitutionality of the Virginia attachment statutes in the case at bar because Petitioner constantly maintained that the validity of the statutes was not an issue. If the statutes were not an issue, then they must be presumed to be Constitutional.

II.

THIS COURT SHOULD NOT PASS UPON THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES, BUT EVEN IF IT DOES UNDERTAKE A REVIEW OF THEM, THEY WOULD BE FOUND TO MEET THE TEST OF DUE PROCESS WHEN MEASURED BY THIS COURT'S PRIOR DECISIONS.

This Court's earlier decisions of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972), must be read in light of its later decisions in Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975). Mitchell and Di-Chem unquestionably modified the requirement of preseizure notice and hearing as enunciated in the earlier cases of Sniadach and Fuentes. Mitchell and Di-Chem require only that

an opportunity for a timely and sufficient hearing be provided.[1]

In the case at bar, the Respondents had a definite interest in seeing that the property subject to the attachment was not depleted. The principal action proceeded to a judgment on the debt in favor of the Respondents in the State Courts. Some of the Petitioner's property was then sold to partially satisfy the judgment. (P. 50).

The recent decisions of this Court have held that Due Process of Law under the Fourteenth Amendment is accorded to a party when he is afforded a timely and sufficient hearing. A hearing meeting the requirements of the Due Process Clause can occur after

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[1]An excellent analysis of the interrelationship of these decisions appears in Brabham, Sniadach through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U.Rich. L. Rev. 157 (1977), and Scott, Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process, 61 Va. L. Rev. 807 (1975).

a questioned event as well as before the event.

> "The usual rule has been '[w]here only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.' Phillips v. Commissioner, 283 U.S. 589, 596-597, 51 S.Ct. 608, 611, 75 L.Ed. 1289 (1931)." Mitchell v. W. T. Grant Co., 416 U.S. at 611, 94 S.Ct. at 1902.

ACCORD, Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2649 (1979) (Summary suspension by New York State of harness racing license without presuspension hearing does not violate Due Process Clause if a sufficient timely post-suspension hearing is promptly provided); Mackey v. Montrym, 443 U.S. 1, 99 Sup.Ct. 2612 (1979) (Massachusetts statute mandating suspension of driver's license for failure to take breathalyzer test upon arrest for drunk driving did not violate Due Process Clause when a post-suspension hearing is available immediately at request of driver).

In Virginia after an attachment has been issued, the debtor has the right to a judicial hearing by simply making a request to the court in which the attachment is pending. The following statute, Virginia Code §8-556 was effective when the attachment was issued in the present case:

Va. Code Ann. §8-556. Quashing attachment of rendering judgment for defendant.

> The court in which an attachment is pending, or the judge of such court in vacation may, either before or at any time after an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the attaching creditor, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or was issued on false suggestion, or without sufficient cause. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and there

shall be an order for the restoration of the attached effects. (Petitioner's Brief, p. 14) (Emphasis added).

It is submitted that the State of Virginia has satisfied the Due Process Clause by providing for a timely post-attachment judicial hearing simply on motion of the defendant. In North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, at 607, 95 S.Ct. 719 at 723, this Court found the garnishment statutes of Georgia did not satisfy the Due Process Clause, in part, because there "... is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment". Mr. Justice Powell observed, in a concurring opinion: "The most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing." North

Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. at 613, 95 S.Ct. at 725. The Virginia statute has no such deficiency and meets the standard of a timely and sufficient hearing required by the Due Process Clause.

Not only do the Virginia statutes meet the requirements of an early hearing and fiscal responsibility of the creditor, they go much further toward insuring the debtor Due Process of Law. A reading of the Virginia attachment statutes reveals a plan whereby, under circumstances which are basically limited to the loss or devaluation of security or property (Virginia Code §8-520, Petitioner's Brief, pp. 5-6) a claimant (Virginia Code §8-519, Petitioner's Brief, p. 5) may upon a sworn petition before the clerk of court cause that clerk to issue a writ of attachment if the petition contains verified

allegations that the debtor intends to engage in specified acts to the injury of his creditors (Virginia Code §8-524, Petitioner's Brief, pp. 6-8 and Virginia Code §8-526, Petitioner's Brief, pp. 8-9). The writ of attachment directs the sheriff to levy upon the property described in the writ (Virginia Code §8-533, Petitioner's Brief, pp. 9-10) but he is not empowered to seize the property unless the appropriate bond is posted (Virginia Code §8-538, Respondent's Brief, pp. 2-3). The levy will be voided by the mere act of the debtor filing a verified grounds of substantial defense, if the creditor thereafter fails to post the proper bond (Virginia Code §8-539, Petitioner's Brief, pp. 10-11). Moreover, the debtor is given the opportunity to go immediately before the appropriate judge to contest the attachment, and if the judge finds

that the grounds for the attachment do not exist or that it was issued on false suggestion, or without sufficient cause,[2] then the attachment will be quashed (Virginia Code §8-556, Petitioner's Brief, p. 14).

There is no substantial distinction between the attachment statutes of the State of Virginia and the sequestration statutes of the State of Louisiana which were approved by this Court in Mitchell with the exception of the issuing official being a clerk rather than a magistrate.[3]

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[2]See Carey v. Sugar, 425 U.S. 73, 96 S.Ct. 1208 (1976), where this Court apparently holds that had the issue of whether the creditor would be likely to succeed on the merits of his claim been a permissible one for decision in a hearing under the New York statute, the statute would have met the minimum requirements of due process.

[3]Justice Powell in his concurring opinion in Di-Chem did not require the issuing official to be a judicial official, but only a neutral party. See Footnote 3 to concurring opinion, 419 U.S. at 612, 95 S.Ct. 719.

Indeed, the Mitchell Court's description of an appropriate attachment procedure fits the Virginia statutes like a glove. There it was said:

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors without notice, hearing or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its affect upon the result of the suit.' The fact that the execution is issued in the first instance by an agent of the State, but not from a court, followed by personal notice and a right to take the case to court, is a familiar method... and is open to no objection." Mitchell v. W. T. Grant Co., 416 U.S. at 613, 94 S.Ct. at 1903.

III.

THE PETITIONER'S COMPLAINT FAILS TO SHOW THE DEPRIVATION OF ANY PROPERTY RIGHT SECURED AND PROTECTED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES.

A. DEPRIVATION OF PROPERTY BY PRIVATE INDIVIDUAL NOT PROTECTED BY FOURTEENTH AMENDMENT.

The decision of the Fourth Circuit and the Petitioner's Brief only consider whether the Respondents were acting "under color of state law" in determining if the Complaint filed by the Petitioner in the District Court stated a cause of action under 42 U.S.C. §1983. However, an equal, if not more serious, defect in the Petitioner's Complaint is that it fails to show that the Petitioner was deprived of a right "secured by the Constitution and the laws" of the United States.

In Flagg Bros., Inc. v. Brooks, 436 U.S. at 156, 98 S.Ct. at 1733, this Court stated the following two requirements of a viable cause of action under §1983:

> "A claim upon which relief may be granted to respondents ...under § 1983 must embody at least two elements. Respondents are first bound to show that they have been deprived of a right 'secured by the Constitution and the laws' of the United States. They must secondly show that Flagg Brothers deprived them of this right acting 'under color of any statute' of the State of New York. It is clear that these two elements denote two separate areas of inquiry."

As previously discussed in Argument I, the Petitioner did not challenge the Constitutionality of the Virginia statutes in the courts below, nor did he question the ministerial acts of the court clerk and sheriff. Therefore, the statutes and conduct of the state officials are presumtively valid.

The Petitioner refers to no other right secured by the Constitution than the Due Process Clause of the Fourteenth Amendment. The Respondents agree that the Petitioner may have been deprived of property rights and that state officials performed ministerial acts by issuing the attachment. However, the Fourteenth Amendment does not protect against all deprivations of property. "The Fourteenth Amendment protects only against deprivations 'without due process of law.'" Parratt and Lugenbill v. Taylor, 101 S.Ct. 1908, 1913, 49 U.S.L.W. 4509, 4511 (May 18, 1981). Likewise, the Amendment offers no protection from deprivation of property by private individuals. In Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 95 S.Ct. 449, 453 (1974), this Court reaffirmed "...the essential dichotomy set forth in that Amendment between

deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield."

When all of the Petitioner's allegations of fact are accepted as true, the record of this case demonstrates that the Petitioner has shown nothing more than the private misuse of a valid state statute by a citizen. The fact that Virginia enacted various attachment statutes does not make the actions of private individuals attributable to the State. Under the decisions of this Court, the Virginia statutes are Constitutional. Mitchell v. W. T. Grant Co., supra, and North Georgia Finishing, Inc. v. Di-Chem, Inc., supra. Even though the Petitioner may have been deprived of property, the State and her ministerial agents have

accorded "due process of law" to the Petitioner within the meaning and protective shield of the Fourteenth Amendment.

B. REMEDIES PROVIDED BY STATE LAW TO REDRESS WRONGFUL DEPRIVATION OF PROPERTY SATISFIES PROCEDURAL DUE PROCESS MANDATED BY FOURTEENTH AMENDMENT.

In an attempt to insure that no citizen is deprived of property without "due process of law," the Virginia attachment statutes provide for a hearing to quash the attachment at any time after it has been returned simply on motion of the defendant. (Virginia Code Annotated, 1950, §8-556, Petitioner's Brief, p. 14). In addition to a hearing to determine if an attachment should be quashed, the tort remedies of Virginia also provide a means of redress for citizens who have suffered

property deprivations by malicious creditors. Initially, the attachment statutes require a bond, with security, in a penalty at least double the amount of the creditor's claim as protection for a debtor who suffers monetary loss by reason of suing out an attachment. (Virginia Code Annotated, 1950, §8-539, Petitioner's Brief, pp. 10-11). In the present case, the required bond was posted by the Respondents.

The State of Virginia also recognizes the tort remedy of abuse of process. In Glidewell v. Murray-Lacy and Co., 124 Va. 563, at 571 (1919), the Supreme Court of Virginia stated: "...if process is wilfully used for a purpose not justified by the law, it is an abuse for which an action will lie." Accord, 14B Michie's Jurisprudence of Virginia and West Virginia, "Process", section 61, "Abuse of Process", pp. 422-424 (1978). The

Petitioner's Complaint alleges a typical state cause of action for abuse of process: paragraph 20 of Count II alleges that the Respondents acted "contrary to Virginia law" in causing the attachment to issue (J.A., p. 13); paragraph 34 of Count II alleges that Petitioner suffered damages because of the "malicious, wanton, wilful and unlawful acts" of the Respondents in regard to the attachment (J.A., p. 17); in paragraphs 4, 5 and 6 of Count III, the Petitioner continues to allege malicious intent and unlawful conduct by the Respondents in regard to the attachment (J.A.,pp. 19-20).

Under the facts of the present case, the remedies afforded the Petitioner by the State of Virginia to redress property deprivations suffered at the hands of a malicious creditor satisfies the requirements of procedural due process mandated

by the Fourteenth Amendment. Parratt and Lugenbill v. Taylor, 101 S.Ct. 1908, 49 U.S.L.W. 4509 (May 18, 1981).

IV.

A PRIVATE LITIGANT ACTING PURSUANT TO A VALID STATE STATUTE, DOES NOT ACT UNDER "COLOR OF LAW" WITHIN THE MEANING OF §1983 UNLESS THERE IS A JOINT UNDERSTANDING AND ENGAGEMENT BETWEEN THE PRIVATE LITIGANT AND A STATE OFFICIAL TO IMPROPERLY USE THE POWER OF THE STATE.

When all of the allegations in the Petitioner's Complaint and all arguments by counsel for Petitioner are accepted as true, the District Court and the Court of Appeals were presented with the following situation:

(1) The State of Virginia attachment statutes were not attacked as being unconstitutional. In fact, the Petitioner refused to raise the issue in a clear direct manner;

(2) The Petitioner did not claim an unconstitutional application of the Virginia statutes in the State attachment proceeding;

(3) No State custom or policy relating to the attachment statutes was claimed to be unconstitutional;

(4) The Petitioner did not allege that any State official of Virginia acted improperly or not in good faith in performing the ministerial function of his position in an attachment proceeding pursuant to the statutes. In fact, the Petitioner states that the State officials acted only in accordance with the law. (Petitioner's Brief, p. 16).

Against the aforesaid background presented by the Petitioner, the Fourth Circuit correctly formulated the issue for decision: whether the mere institution by a private litigant (Respondents) of presumptively valid state judicial proceedings, without any allegation of joint collusive acts at any time by the private litigant and state officials who in good

faith then perform their respective ministerial functions in the attachment proceeding, constitutes action under color of state law within contemplation of §1983? See P. 53-54. The Court of Appeals held that a complaint alleging only this conduct fails to allege that the Respondents acted under color of state law and the action was dismissed for failure to state a claim cognizable under §1983. See P. 106.

The majority opinion of the Fourth Circuit in reaching its decision in this case is correct. It properly applies the principles of Dennis v. Sparks, ____ U.S. _____, 101 Sup.Ct. 183, 49 USLW 4001 (Nov. 17, 1980), and Flagg Brothers v. Brooks, 436 U.S. 149 (1978). Further, in reviewing the decisions of this Court, the Circuit Court properly pointed to the decisions where a public official was

improperly using his authority in conjunction with the private litigant to deprive a complainant of a constitutionally protected right. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

Neither the Petitioner nor the dissenting judges in the Circuit Court have cited a case in which a state official acting in good faith in conjunction with a private litigant pursuant to a Constitutionally valid statute, regardless of the purposes or motivation of the private litigant, has been able to furnish the necessary "color of law" requirement to sustain an action under 42 U.S.C. 1983.

The dissenting opinion of the Circuit judges relies primarily on Fuentes in support of its rationale. Such reliance is misplaced because, as pointed out above, the act of the private litigant in Fuentes was taken in conjunction with a public

official pursuant to an unconstitutional statute. Nowhere in the Fuentes opinion is it ever intimated that the action of the official issuing the writ of replevin or of the private litigant requesting it would have deprived the plaintiff of due process, but for the fact the action was taken pursuant to the unconstitutional statute.

In the case at bar, the Court of Appeals acknowledged that there was state action through its involvement of the clerk of court and sheriff in the Virginia attachment proceedings. However, this acknowledgment does not answer the question of whether the specific action charged to the Respondents was the type of state action to be considered as taken under color of state law within contemplation of a §1983 action. See P. 92-95. In any Federal action based upon §1983, the

ultimate concern is "... the state's conduct, whether action or inaction, not the private conduct, that gives rise to constitutional attack." (Opinion of Court of Appeals, P. 72).

This Court recognized in Adickes v. S. H. Kress and Co., 398 U.S. 144 at p. 152, 90 S.Ct. 1598 at pp. 1605-1606, that even though a §1983 action

> "...is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under §1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store...." (Emphasis added).
>
> * * *
>
> "The involvement of a state official in such a conspiracy plainly provides the state action essential to show

> a direct violation of petitioner's Fourteenth Amendment rights...." (Emphasis added).
>
> * * *
>
> "Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under §1983. 'Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.'" (Emphasis added).

In the case at bar, Petitioner's claim as presented in the District Court and Court of Appeals was nothing more than allegations suggesting that a private party could challenge a deprivation of a Constitutional right by another private party even though the State law was valid and all conduct by State officials was

proper under the law. Although Petitioner is now attempting to raise a challenge to the Virginia statutes for the first time in this Court, his basic claim as commenced in the District Court is still the same. (Petitioner's Brief, p. 28).

The opinion of the Court of Appeals must be considered in relation to the factual case presented for decision by the Petitioner. It is obvious from the record and arguments presented to the Fourth Circuit that no improper use of State power or improper conduct by State officials was present to supply the necessary state action or action under color of law by Respondents to sustain a §1983 action. The private conduct of the Respondents was independent of, not joint with, the official conduct of the State in the attachment proceedings. The Petitioner's §1983 claim was properly dismissed because

the Complaint failed to show that the Respondents acted under color of law. (P. 106). Action under color of law within the contemplation of §1983 is not provided by

> "... merely invoking a state's judicial process and thereafter participating in it solely as private litigant does not constitute joint engagement or participation by the private litigant with the state officials who then independently conduct and enforce that process." (P. 104).

Under the facts of the present case as alleged by Petitioner, the Court of Appeals held that there must be a usurpation or corruption of official power by a private actor so that the independence of the official has been compromised. (P. 102-104). The literal wording of this test for a §1983 complaint may be too restrictive.

It is submitted that a more proper test under the facts of the present case would be for this Court to adopt the reasoning of Justice Powell in his concurring opinion in Parratt and Lugenbill v. Taylor, 101 S.Ct. 1908, 1919-1920 (1981):

> "The intent question cannot be given 'a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action,' Baker v. McCollan, 443 U.S. 137, 139-140, 99 S.Ct. 2689, 2692-2693, 61 L.Ed.2d 433 (1979). Rather, we must give close attention to the nature of the particular constitutional violation asserted in determining whether intent is a necessary element of such a violation."
>
> "In the due process area, the question is whether intent is required before there can be a 'deprivation' of life, liberty or property."
>
> * * *
>
> "A 'deprivation' connotes an intentional act denying

> something to someone, or, at the very least, a deliberate decision not to act to prevent a loss. The most reasonable interpretation of the Fourteenth Amendment would limit due process claims to such active deprivations. This is the view adopted by an overwhelming number of lower courts, which have rejected due process claims premised on negligent acts without inquiring into the existence or sufficiency of the subsequent procedures provided by the States. In addition, such a rule would avoid trivializing the right of action provided in §1983. That provision was enacted to deter real abuses by state officials in the exercise of governmental powers. It would make no sense to open the federal courts to lawsuits where there has been no affirmative abuse of power...." (Emphasis added).

Under the reasoning of Justice Powell, as well as the decision of the Fourth Circuit, the Petitioner fails to allege that the Respondents acted under color of law as contemplated by a §1983 action.

CONCLUSION

For the foregoing reasons stated in the Arguments in this Brief, the Respondents respectfully move the Court that the decision of the United States Court of Appeals for the Fourth Circuit be affirmed. The Petitioner's Complaint and the subsequent arguments of his counsel to the District Court and the Court of Appeals clearly demonstrate that he has not stated a claim which is cognizable under 42 U.S.C. §1983.

Respectfully submitted,

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and
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CERTIFICATE OF SERVICE

Pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I, the undersigned, do hereby certify that:

1. I am a member of the Bar of this Court, in good standing and represent the Respondents herein.

2. Pursuant to Rule 28.3, I have caused three copies of the Respondents' Brief to be served upon Robert L. Morrison, Jr., of Warren, Parker, Williams and Stillwell, 317 Patton Street, Suite B, Danville, Virginia, 24541.

3. Pursuant to Rule 28.4(c), I have caused three copies of the Respondents' Brief to be served upon the Attorney General of Virginia and that no question has been certified by any Court of the United States to the Attorney General of

Virginia on the question of constitutionality of the state statute, this 21st day of September, 1981.

James W. Haskins
James W. Haskins

AFFIDAVIT OF SERVICE

In accordance with the Rules of the Supreme Court of the United States, I hereby certify that I am a member of the Bar of this Court and that on the 21st day of September, 1981, the required copies of the Respondents' Brief on the Merits were mailed to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, Washington, D.C., 20543.

James W. Haskins
James W. Haskins

Subscribed and sworn to before me this 21st day of September, 1981.

My commission expires December 28, 1981.

Virginia E. Roberts
Notary Public